

VZCZCXRO7846
OO RUEHCHI RUEHCN RUEHDT RUEHHM
DE RUEHBK #3272/01 3641022
ZNR UUUUU ZZH
O 301022Z DEC 09
FM AMEMBASSY BANGKOK
TO RUEHC/SECSTATE WASHDC IMMEDIATE 9432
INFO RUCPDO/DEPT OF COMMERCE WASHINGTON DC IMMEDIATE
RUEHRC/DEPT OF AGRICULTURE WASHINGTON DC IMMEDIATE
RUEATRS/DEPT OF TREASURY WASHINGTON DC IMMEDIATE
RUEAWJL/DEPT OF JUSTICE WASHINGTON DC IMMEDIATE
RUEHXS/ASSOCIATION OF SOUTHEAST ASIAN NATIONS IMMEDIATE
RUEHCHI/AMCONSUL CHIANG MAI IMMEDIATE 7436

UNCLAS SECTION 01 OF 04 BANGKOK 003272

STATE FOR EAP/MLS, EEB/IPE FOR JURBAN
STATE PASS TO USTR FOR BWEISEL, BKLEIN, RBAE
COMMERCE FOR EAP/MAC/OKSA FOR JKELLY, MTORSEN
COMMERCE PASS TO USPTO
SINGAPORE FOR FINATT BLEIWEIS

SENSITIVE
SIPDIS

E.O. 12958:N/A
TAGS: [ECON](#) [ETRD](#) [KIPR](#) [PREL](#) [TH](#)
SUBJECT: AMERICAN IPR OWNERS DISCUSS CONCERNS WITH AMBASSADOR

REF: A. BANGKOK 2984 (FOCUSED ON SPECIAL 301)
[1](#)B. BANGKOK 2848 (PREPARING FOR LOCKE-ALONGKORN MEETING)
[1](#)C. BANGKOK 2768 (PRIME MINISTER MEETS APCAC)
[1](#)D. BANGKOK 1338 (NEW INTELLECTUAL PROPERTY STRATEGY)
[1](#)E. BANGKOK 1203 (PATPONG RAID)
[1](#)F. BANGKOK 379 (RIGHT MOVES ON IPR)

BANGKOK 00003272 001.2 OF 004

[1](#)1. (SBU) SUMMARY: Earlier this month, the Ambassador met with a group of key American intellectual property rights owners to discuss their take on the current intellectual property milieu in Thailand. The Ambassador emphasized that, with high-level Thai government interest in intellectual property rights issues, now is the time for the USG and US industry to help direct the Government's efforts towards meaningful intellectual property reforms. Although participants were pleased with Prime Minister Abhisit's strong messages on intellectual property, these rights holders reported limited progress on specific issues of most interest to them. Company representatives applauded the government's "Creative Thailand" initiative to expand the Thai economy into more innovation-based sectors, but fear that the government's support to this point is still too narrow to generate broad public support for IPR. Nonetheless, representatives have been heartened by the recent effort of Thailand's Department of Intellectual Property to reach out to industry and hold regular interministerial meetings to improve Thailand's intellectual property regime. The Ambassador also plans to meet with rights holders more frequently to further strategize how we can help improve the promotion and protection of IPR in Thailand in support of the Thai authorities. Industry representatives expressed appreciation for the high level embassy engagement and the Ambassador's expressed interest on complex IPR issues. END SUMMARY.

Strong Messages from the Thai Government

[1](#)2. (SBU) The Ambassador met with a diverse group of intellectual property rights owners doing business in Thailand on December 1. Participants included representatives from the motion picture, software, music, publishing, and pharmaceutical industries, as well as law firms and investigators who represent American patent and brand owners. Ambassador John asked the group to help the embassy address their intellectual property concerns by providing practicable suggestions the USG could propose to the Thai government. Participants praised the accessibility of Deputy Minister of Commerce Alongkorn Pornlaboot and Prime Minister Abhisit on IP issues. They are pleased that intellectual property has been

placed on the national agenda.

13. (SBU) Participants praised the Abhisit Government for an intellectual property reform effort in a series of legal amendments currently under review by the government. Copyright industry representatives explained that there are currently three sets of copyright amendments in the pipeline, each being considered separately. The first set of provisions would provide for landlord liability for sales of infringing goods on their premises and institute buyer liability for purchases of infringing products. Industry praised these amendments, saying they could go a long way towards ending piracy at certain "notorious markets" mentioned in USTR's Special 301 Report. The second set of provisions would implement certain obligations under the World Intellectual Property Organization Copyright and Performances and Phonograms Treaties. An industry representative serving on the Thai working group looking at these amendments reported that the provisions have not changed significantly since the 2004 meetings between USTR and the Thai Government on the then-draft provisions. A third set of amendments is intended to create a government-regulated collecting society to administer rights in musical works and sound recordings. These amendments have been very controversial, because they would require a change of business practices for Thailand's two largest music enterprises, RS and GMM Grammy.

14. (SBU) Although industry representatives are encouraged by these developments, the Cabinet has not yet submitted any of the proposed legislation to the Parliament for review. The rights holders encouraged the Ambassador to keep pressure on the Abhisit Administration to ensure that these amendments do not languish in the legislative process.

Positive Moves on Enforcement

BANGKOK 00003272 002.2 OF 004

15. (SBU) A representative of the publishing industry noted that Deputy Minister Alongkorn and Department of Intellectual Property (DIP) Director General Pajchima Tanasanti were pushing the Royal Thai Police and Department of Special Investigations to work with industry closely in investigating the source of counterfeit textbooks that had been found in the US market. (COMMENT: Pajchima's recent appointment as DIP Director General was pushed by Deputy Commerce Minister Alongkorn, during what we have been told was a contentious reshuffle at the Ministry. Pajchima brings a pro-enforcement reputation to the job. END COMMENT.) Software industry representatives highlighted that the high-level attention from the Thai government has led to greater cooperation by the Economic Crimes Division (ECD) of the Royal Thai Police in particular. These representatives praised the initiative of the ECD Chief Commander Kowit, who signed and sent out thousands of letters to corporate end-users, warning them to legitimize their software use or face criminal action. The Business Software Alliance (BSA) plans to follow through on the ECD letter campaign and start raiding targets that have not legitimized software since receiving the letters.

16. (SBU) One impediment to the software enforcement campaign has been the difficulty of obtaining search warrants from the Central Intellectual Property and International Trade Court. In early 2009, the software industry met with the court and demonstrated that only three percent of its requests for search warrants had been successful in 2008. Based on that information, a particular group of judges began to more regularly issue search warrants for intellectual property cases, while others still refused to do so. Software industry representatives told the Ambassador that they now have a 30 to 40 percent success rate in obtaining warrants -- a marked improvement -- but still face difficulties from some judges. The difficulty of obtaining search warrants was a problem cited by meeting participants as a significant impediment to intellectual property enforcement. (NOTE: One software company filed a civil suit against an infringer this year and was pleased that the court issued Anton Piller orders (the right to search and seize evidence without prior warning) permitting the plaintiffs to gather evidence against the defendant. The court also awarded significant damages in the

case. This was the first significant successful civil infringement case reported by US industry. END NOTE.)

Is IPR Enforcement Rising or Falling?

17. (SBU) Thai Government figures that show a rise in both quantity and quality of enforcement actions (ref A). However, rights holders in the music, motion picture, and pharmaceutical industries, as well as several lawyers representing a broad array of foreign IP owners, reported that from their perspective the number of IP enforcement actions in 2009 has significantly declined from 2008. They explained that because of the financial crisis and consequent limited corporate resources, that rights owners have initiated fewer cases, while in their experience Thai law enforcement authorities rarely take the initiative to begin cases without prior rights owner investigation. Therefore, the number of enforcement actions should be lower in 2009. Moreover, rights owners say they carry the burden of investigating a suspected infringer, obtaining sufficient evidence for a search warrant, paying for a raid action, and following up to be certain that the police hand the case over to a prosecutor, making it less likely that Thai authorities are acting on their own.

18. (SBU) For copyright owners, the legal environment is problematic. Under Thai law, the "compoundable offense" provision in Section 66 of the Copyright Act allows copyright owners to settle criminal cases out of court and requires the copyright owner to file a complaint in order to initiate a law enforcement raid, and this is the route that rights holders are encouraged to take. The copyright industries believe that there are numerous other laws, including trademark, labeling, and censorship laws that would permit law enforcement to take action that would be more effective. The decline in numbers of enforcement actions has not led to countervailing rise in the quality of investigations, they believe. Other than one raid against an optical media factory, there have been no significant cases brought against major infringers. From industry's perspective, the thousands of raids each year against small retail targets do not have sufficient deterrent effect.

BANGKOK 00003272 003.2 OF 004

19. (SBU) Industry reps cited data to make their point. According to data provided by the Court, nine people were jailed for IP-related offenses in 2007, two in 2008, and five so far in 2009. Fines, rather than jail sentences, are preferred by the courts as being more appropriate for low-level street vendors. Local IP law firm Tilleke and Gibbins provided statistics demonstrating that 94 percent of fines meted out by the Court are below 50,000 Baht (approximately \$1,500). The largest fine over the past year was issued in a case involving the state-owned enterprise Thailand Tobacco Monopoly. Industry reps also noted that the court will rarely, if ever, grant preliminary injunctions against infringing activities.

Prescriptions Still Pending for Pharmaceutical IP

10. (SBU) The fight against counterfeit drugs pits industry interests against the concerns of others distrustful of industry. While industry would like to bring public attention to the prevalence of counterfeit medicines in the market, Thai law prohibits advertising to consumers on drug-related matters. When the pharmaceutical industry attempted to train officials on anti-counterfeiting, health activist NGOs protested, claiming that industry exaggerates the scope of counterfeiting in Thailand and is trying to block generics rather than actual counterfeit medicines.

11. (SBU) During the meeting with the Ambassador, pharmaceutical industry reps noted that their counterfeiting problems were worsening in Thailand. Counterfeit drugs are readily available from street vendors. The representatives would like the Thai authorities to adopt a zero tolerance policy for counterfeit drugs and start proactive enforcement, but the government is also dealing with other forces who believe that any cooperation with pharmaceutical companies will result in fewer, more expensive drugs available in

Thailand. The pharmaceutical industry and several Thai law enforcement agencies signed an MOU to cooperate in tackling counterfeit medicines in 2008, but the representatives present said that the Food and Drug Administration of the Ministry of Public Health still is not cooperating on the MOU, largely, they believe, because of its position on generic drugs. Company representatives reported that even though Thai IP laws do not require a pharmaceutical rights holder to make a complaint in order to investigate counterfeit drugs, enforcement authorities are reluctant to take action unless industry brings a completed investigation to them. When enforcement authorities do conduct a raid, they seize only the counterfeit products, making it impossible to use records, computers, or other evidence to investigate the source of the product.

¶12. (SBU) On the legislative and administrative front, industry representatives reported that Thailand does not provide pharmaceutical test data exclusivity and that patenting drugs in Thailand has been next to impossible. Although Thailand's Trade Secrets Law created a trade secrets regime, the law only protects the pharmaceutical companies' test dossiers from disclosure. To facilitate wider availability of pharmaceuticals, the Thai FDA regularly provides marketing approval to generic products based on bioequivalence testing alone, thereby giving a significant cost advantage to generic companies that did not invest in testing a drug.

¶13. (SBU) Industry representatives explained that the need for data exclusivity is in part due to the significant problems they face in patenting their drugs in Thailand. (COMMENT: Over the past three years, members of the Thai patent bar have been unable to provide examples of any drug patent application that had been registered in Thailand during that period. Law firms in Thailand generally advise their clients that patent protection is unlikely. END COMMENT.) One law firm provided data to show that although several drugs were issued Thai patents in 2009, these patent applications had all been pending for between ten and twenty years. In some cases, lawyers reported that the patent applications had been fully examined and approved but stagnated for several years because high-level DIP officials would not sign the patent grant certificates. Industry hopes that implementation of the Patent Cooperation Treaty, to which Thailand recently acceded (ref A), will help overcome this reluctance and speed patent processing.

¶14. (SBU) While appreciating the fact that there have been no new

BANGKOK 00003272 004.2 OF 004

compulsory licenses issued by the Abhisit government, the pharmaceutical sector bemoaned their lack of dialogue with public health authorities. The industry is especially concerned that NGO and Ministry of Public Health activists continue to advocate for greater public access to medicines, despite existing patent protection. Thailand's National Health Assembly and its subcommittees do not generally seek industry input on key issues like patent reform, compulsory licensing, or pharmaceutical marketing and sales practices. Industry is concerned with the National Health Assembly's activist tendencies because the Prime Minister serves as its chair, and there is little review of its policy recommendations. Industry representatives also mentioned growing concerns over nontransparent procurement processes for medicines and the preferential treatment given to the Government Pharmaceutical Organization, a state-owned enterprise manufacturing generic products.

Moving Forward

¶15. (SBU) Ambassador John told participants that the current relative political stability in Thailand makes this a key time for the USG to help direct the Thai Government towards meaningful intellectual property reform. Participants mentioned several times that the Abhisit administration is very focused on improving their placement on the Special 301 Priority Watch List. When one industry enforcement representative compared the difficulty of working in Thailand to his company's experience working in Vietnam, China,

Taiwan, and Korea, Ambassador John asked participants to describe the key differences between the approaches taken by these governments. Participants opined that only very strong political will can change the environment for intellectual property owners in developing countries. From their perspective, Thailand still lacks the political will to create tangible results.

¶16. (SBU) Although industry representatives had hoped that the Creative Thailand initiative might provide them with an opportunity to partner with the Royal Thai Government in moving towards an intellectual property-based economy, they now question how effective the effort will be in broadening support for IPR in general. Pharmaceutical industry representatives noted that scientific and technological research and development are not considered part of the creative economy. Unsurprisingly, DIP and Deputy Minister Alongkorn are focused initially on the Thai film industry, as well as areas such as traditional food and crafts and tourism, where Thailand's economy is already reasonably strong.

¶17. (SBU) Nonetheless, the moment is ripe to engage further with Thailand's Department of Intellectual Property which has reached out to industry to hold regular interministerial meetings to improve Thailand's intellectual property regime. The first meeting is expected to be held in January. The Ambassador also plans to meet with this group of rights holders more frequently to further strategize how we can help improve the promotion and protection of IPR in Thailand in support of the Thai authorities. Industry representatives expressed appreciation for the high level embassy engagement and the Ambassador's interest on complex IPR issues.

JOHN